# Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **27th day of June, 2023** are as follows:

**BY Griffin, J.:**

2022-C-01088 NEWTEK SMALL BUSINESS FINANCE, LLC AS SUCCESSOR IN INTEREST BY MERGER TO NEWTEK SMALL BUSINESS FINANCE, INC. VS. ROBERT A. BAKER AND ELSA M. BAKER (Parish of St. Tammany)

AFFIRMED AS AMENDED. SEE OPINION.

Weimer, C.J., dissents and assigns reasons.

**SUPREME COURT OF LOUISIANA**

**No. 2022-C-01088**

**NEWTEK SMALL BUSINESS FINANCE, LLC AS SUCCESSOR IN INTEREST BY MERGER TO NEWTEK SMALL BUSINESS FINANCE, INC.**

**VS.**

**ROBERT A. BAKER AND ELSA M. BAKER**

*On Writ of Certiorari to the Court of Appeal, First Circuit, Parish of St. Tammany*

**GRIFFIN, J.**

We granted this writ to determine whether the protections accorded to a principal debtor by the Louisiana Deficiency Judgment Act ("LDJA") extend to the sureties of the principal debtor. Specifically, whether a creditor's recovery in a deficiency judgment action is barred against a surety when a creditor forecloses on property through a judicial sale without appraisal. Harmonizing the LDJA with the law of suretyship, we agree with the court of appeal that such recovery is barred.

## FACTS AND PROCEDURAL HISTORY

Baker Sales, Inc. ("BSI") obtained two loans from Newtek Small Business Finance, Inc. ("Newtek") in the amounts of $1,960,000.00 and $1,215,000.00 which were secured by mortgages on BSI's commercial property. Robert and Elsa Baker (collectively "the Bakers") executed agreements unconditionally guaranteeing payment of all amounts owed on the loans. These agreements were secured by conventional mortgages on the Bakers' home.

BSI filed for bankruptcy approximately two years later. Newtek filed a proof of claim in the bankruptcy proceeding for $3,044,569.46 against BSI's estate – the total amount of the outstanding balance of the loans. The bankruptcy court granted Newtek's motion to lift the automatic bankruptcy stay. Newtek then filed a petition

for executory process in state court against BSI and the Bakers requesting seizure and sale of BSI's commercial property without the benefit of appraisal. Newtek purchased the seized property – which had previously been appraised for $2,800,000.00 around the time of the execution of the loan agreements – at the sheriff's sale for $81,130.00. The bankruptcy case was subsequently closed.

Newtek commenced the instant suit by filing a petition for executory process against the Bakers as guarantors of BSI's debt, seeking to foreclose on the Bakers' home. The trial court issued a judgment preliminarily enjoining the sale of the Bakers' home and converted the proceeding from executory to ordinary. The Bakers filed a petition seeking a declaration under the LDJA that as the underlying debt was extinguished, Newtek could no longer pursue them as sureties. Cross-motions for summary judgment were filed. The trial court denied Newtek's motion for summary judgment and partially granted the Bakers' motion for summary judgment finding the LDJA applies to extinguish the debt.[1] Relying on the law of the circuit, the court of appeal affirmed observing that as extinguishment of the principal obligation by operation of the LDJA is not a personal defense, it may be asserted by a surety. *Newtek v. Small Business Finance, LLC v. Baker*, 21-0882, pp. 10-11 (La.App. 1 Cir. 5/24/22), 342 So.3d 926, 934 (citing *MGD Partners, LLC v. 5-Z Investments, Inc.*, 12-1521 (La.App. 1 Cir. 6/2/14), 145 So.3d 1053 and *Simmons v. Clark*, 64 So.2d 520 (La. App. 1st Cir. 1953)).

Newtek's writ application to this Court followed, which we granted. *Newtek Small Business Finance, LLC v. Baker*, 22-1088 (La. 11/1/22), 348 So.3d 1283.

## DISCUSSION

The issue presented is whether the LDJA bars Newtek's ability to maintain a deficiency judgment action against the Bakers as sureties to the underlying debt of

[1] The trial court also ordered Newtek to cancel the inscriptions of the mortgages executed by the Bakers from the conveyance records.

$3,044,569.46. Statutory interpretation is a question of law subject to *de novo* review. *Berkley Assurance Co. v. Willis*, 21-1554, p. 3 (La. 12/9/22), 355 So.3d 591, 593. Similarly, the grant or denial of a motion for summary judgment is reviewed *de novo* using the same criteria as trial courts. *Id*.

A deficiency judgment is a judgment rendered in favor of a creditor for the difference between the amount of a debt and the amount realized in a judicial sale held when a creditor forecloses on property by way of executory proceeding. *See First Acadiana Bank v. Bieber*, 582 So.2d 1293, 1295 (La. 1991). A creditor may obtain a deficiency judgment against a debtor only if the property is sold under the executory proceeding after appraisal. *See id* (citing La. C.C.P. arts. 2771 and 2772; La. R.S. 13:4106). If a creditor takes advantage of a waiver of appraisal by the debtor, the debt stands "fully satisfied and discharged insofar as it constitutes a personal obligation of the debtor" regardless of whether the proceeds of the judicial sale are sufficient to satisfy the debt. La. R.S. 13:4106(A). Thus, the LDJA prevents a creditor from circumventing the requirement of appraisal, buying the foreclosed upon property at a low price, and subsequently obtaining a windfall personal judgment against the debtor. *See Williams v. Perkins-Seigen Partnership*, 633 So.2d 1247, 1251 (La. 1994); Michael H. Rubin & Jamie D. Seymour, *Deficiency Judgments: A Louisiana Overview*, 69 LA. L. REV. 783, 786, 798-99. As declared public policy by the legislature, this protection shall not be waived. La. R.S. 13:4107.

Newtek argues the lower courts application of the LDJA to the Bakers, in their capacity as sureties, misinterprets the plain language of La. R.S. 13:4106(A); diverges from this Court's pronouncement in *Southland Inv. Co. v. Motor Sales Co.*, 198 La. 1028, 5 So.2d 324 (1941); and undermines the laws of suretyship. The Bakers counter that *Southland* is distinguishable and that the lower courts'

interpretation of the LDJA, in harmony with the laws of suretyship, best conforms to its purpose. We agree.

*Southland* is inapposite having been decided under case-specific circumstances wherein the property at issue was sold at a private sale as a result of a workout agreement.[2] 198 La. at 1034, 5 So.2d at 326. In *dicta*, the opinion states the LDJA was "enacted for the benefit and protection of the mortgage debtor." *Id*. We decline to interpret this language as an implicit determination that the LDJA is inapplicable to sureties. Further, resort to jurisprudence is unnecessary when an issue may be decided by the positive law. *See Bergeron v. Richardson*, 20-1409, p. 9 (La. 6/30/21), 320 So.3d 1109, 1116. "[A] very civilian approach." *Clark v. Bridges*, 23-0237 (La. 2/22/23), 356 So.3d 990, 1000 (McCallum, J., concurring).

The absence of a reference to sureties in La. R.S. 13:4106(A) presents a gap in the statutory scheme.[3] The general rule of statutory construction is that, where there is a conflict, a specific statute controls over a broader, more general statute. *Succession of Burns*, 22-0263, p. 8 (La. 12/9/22), 354 So.3d 1197, 1203 (quoting *Burge v. State*, 10-2229, p. 5 (La. 2/11/11), 54 So.3d 1110, 1113). However, as a threshold matter, courts are tasked with ascertaining whether a purported conflict between statutes is merely superficial and whether the substance of the laws can be harmonized. *See State ex rel. Caldwell v. Molina Healthcare, Inc.*, 18-1768, p. 10 (La. 5/8/19), 283 So.3d 472, 479. Laws on the same subject matter must be interpreted in relation to each other and the legislature is presumed to enact statutes in light of preceding statutes involving the same subject matter. *Louisiana Mun.*

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[2] Workout agreements such as the one in *Southland* were subsequently codified as exceptions to La. R.S. 13:4106. *See* La. R.S. 13:4108.1 and 13:4108.2.

[3] We find no merit to Newtek's argument that the inclusion of sureties in La. R.S. 13:4108 and 13:4108.1 imply a legislative intent to exclude sureties from the protections of La. R.S. 13:4106(A) by lack of reference therein. The former two statutes operate as exceptions to the latter. If sureties were not protected under La. R.S. 13:4106(A), there would be no need to carve out exceptions for sureties in subsequently adopted statutes. *See Louisiana Mun. Ass'n*, 04-0227, p. 36, 893 So.2d at 837 (courts must give effect to all provisions of a statute and not render an interpretation that makes any part superfluous or meaningless).

*Ass'n v. State*, 04-227, p. 36 (La. 1/19/05), 893 So.2d 809, 837; La. C.C. art. 13. Courts therefore have a duty in the interpretation of statutes to adopt a construction which harmonizes and reconciles it with other provisions dealing with the same subject matter. *Id.*

The plain language of the laws of suretyship dictates a surety is accorded the same protections of the LDJA as the principal debtor. "Suretyship is an accessory contract by which a person binds himself to a creditor to fulfill the obligation of another upon the failure of the latter to do so." La. C.C. art. 3035. "The surety may assert against the creditor *any* defense to the principal obligation that the principal obligor could assert except lack of capacity or discharge in bankruptcy of the principal obligor." La. C.C. art. 3046 (emphasis added). "A commercial suretyship is extinguished to the extent the surety is prejudiced by the action of the creditor." La. C.C. art. 3062. Thus, the Bakers may assert the defense of the LDJA because it is a defense that may be asserted by BSI and does not fall within one of the two specified exceptions of La. C.C. art. 3046.[4] *See* La. C.C. art. 9; *International Paper Co., Inc. v. Hilton*, 07-0290, pp. 19-20 (La. 10/16/07), 966 So.2d 545, 558-59 (observing when the legislature specifically enumerates a list of things, omission of other items is deemed intentional). Further, the actions of Newtek foreclosing through a judicial sale without appraisal rendered the Bakers with no rights of subrogation. *See Simmons*, 64 So.2d at 523; Ronald Lee Davis, Jr., *Louisiana Practice – Deficiency Judgment Act – Application to Surety on Mortgage Note*, 14 LA. L. REV. 285, 288. We agree with the Bakers that such action resulted in the

[4] Newtek relies on Revision Comment (a) to La. C.C. art. 3046 which states it "reproduces the substance of C.C. Art. 3060 (1870)" that precluded a surety from asserting defenses personal to the principal debtor. It contends that because La. R.S. 13:4106(A) discharges a debt "insofar as it constitutes a personal obligation of the debtor," the LDJA is a personal defense thus may not be asserted by the Bakers. We find this distinction immaterial as the plain language of the current version codified in La. C.C. art. 3046 makes no reference to personal defenses. *See* La. C.C. art. 9; La. R.S. 24:177(C) ("where the new article or statute is worded differently from the preceding law, the legislature is presumed to have intended to change the law").

extent of their prejudice being total.[5] La. C.C. art. 3062. Under La. C.C. art. 3035, as there is no longer a principal obligation to fulfill by operation of La. R.S. 13:4106(A), the Bakers are discharged from their obligation as sureties.

**DECREE**

For the foregoing reasons, we amend the judgment of the trial court in part to read "the Louisiana Deficiency Judgment Act (LDJA) applies to discharge the Bakers' obligation as sureties." In all other respects, the lower courts are affirmed.

**AFFIRMED AS AMENDED**

[5] Newtek argues such a result conflates the separate provisions of La. C.C. art. 3062 relating to ordinary and commercial suretyships. This argument ignores there are other instances where a commercial surety may be prejudiced by the actions of a creditor outside of foreclosing through a judicial sale without appraisal. Interpreting the LDJA to permit a creditor from doing indirectly against a surety, commercial or otherwise, what it is expressly prohibited from doing directly to a principal debtor would allow for its circumvention. *See* Davis, *supra*; La. C.C. art. 10.

# SUPREME COURT OF LOUISIANA

**No. 2022-C-01088**

**NEWTEK SMALL BUSINESS FINANCE, LLC AS SUCCESSOR IN INTEREST BY MERGER TO NEWTEK SMALL BUSINESS FINANCE, INC.**

**VS.**

**ROBERT A. BAKER AND ELSA M. BAKER**

*On Writ of Certiorari to the Court of Appeal, First Circuit, Parish of St. Tammany*

**WEIMER, C.J.**, dissenting.

I respectfully dissent in what is a close case. In pertinent part, the Louisiana Deficiency Judgment Act ("Act"), La. R.S. 13:4106(A), provides:

> Unless otherwise provided by law, if a mortgagee or other creditor takes advantage of a waiver of appraisement of his property, movable, immovable, or both, by a debtor, and the proceeds of the judicial sale thereof are insufficient to satisfy the debt for which the property was sold, the debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a personal obligation of the **debtor**. The mortgagee or other creditor shall not have a right thereafter to proceed against the **debtor** or any of his other property for such deficiency, except as otherwise provided by law or as provided in the next subsection. [Emphasis added.]

In **Southland Inv. Co. v. Motor Sales Co.**, the court held that 1934 La. Acts 28, which created the deficiency judgment law, was "enacted for the benefit and protection of the mortgage **debtor**." ***Id.***, 198 La. 1028, 1034, 5 So.2d 324, 326 (1941) (emphasis added). The Act simply precludes the creditor's right to proceed "against the debtor" for the deficiency. A surety is not expressly afforded the same protection by the Act. Thus, a question arises as to whether the protections of the Act extend to sureties of the debtor/principal obligor.

In determining the effect of a judicial sale without appraisal on the creditor's rights against a surety, consideration must be given to the more general laws on suretyship. The majority opinion and my analysis are consistent in that respect. "Suretyship is an accessory contract by which a person binds himself to a creditor to fulfill the obligation of another upon the failure of the latter to do so." La. C.C. art. 3035. Therefore, "the essence of suretyship is that a surety may have to pay a creditor even if the surety cannot collect from the debtor." Michael H. Rubin[1] & Jamie D. Seymour, *Deficiency Judgments: A Louisiana Overview*, 69 La.L.Rev. 783, 848 (2009).[2]

The Act states that the "debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a personal obligation of the debtor." The Act does not provide for the extinguishment or extinction of the principal obligation in such circumstances, as the Act in La. R.S. 13:4106(B)[3] authorizes the sale of other collateral in which a security interest has been given for the principal obligation by the debtor. See Rubin & Seymour, *Deficiency Judgments: A Louisiana Overview*, 69 La.L.Rev. at 836-37. If the legislature intended that the principal obligation be extinguished or become extinct when a creditor opts to have judicial sale occur without appraisal, it would have so provided.

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[1] A long-time adjunct professor at the Louisiana State University Law Center, Mike Rubin has taught generations of law students, has written a copious number of law review articles on the topic of security devices, and is in demand as a lecturer on the topics of security devices and professionalism.

[2] This law review article is also cited by the majority.

[3] La. R.S. 13:4106(B) provides:

> If a mortgage or pledge affects two or more properties, movable, immovable, or both, the judicial sale of any property so affected without appraisement shall not prevent the enforcement of the mortgage or pledge in rem against any other property affected thereby.

Because the alternative language chosen by the legislature does not result in the extinguishment or extinction of the principal obligation, "the accessory obligation constituting the security interest,"[4] here the suretyship, is not extinguished. See La. C.C. art. 3059 ("The extinction of the principal obligation extinguishes the suretyship."). Rather, by opting to conduct the judicial sale without an appraisal, the Act directs that the remaining debt simply cannot be enforced by the creditor against the **debtor**, as the **debtor** has been discharged of the indebtedness. See La. R.S. 13:4106(A); **Southland Inv. Co.**, 198 La. at 1034, 5 So.2d at 326. Based on the non-extinction of the principal obligation, I disagree with the majority's finding that "[t]he plain language of the laws on suretyship dictates a surety is accorded the same protections of the [Act] as the principal debtor."[5] **Newtek Small Business Finance, LLC v. Baker**, 22-0188 (La. 6/__/23), slip op. at 5 (citing La. C.C. arts. 3035 and 3046).

Harmonizing the Act and the laws of suretyship, I believe that the extent to which the non-extinct principal obligation can be enforced against the sureties is addressed in La. C.C. art. 3062, governing the extinguishment of a suretyship when the principal obligation has been modified:

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[4] See Rubin & Seymour, *Deficiency Judgments: A Louisiana Overview*, 69 La.L.Rev. at 837. An accessory contract is one that "is made to provide security for the performance of an obligation," such as a mortgage or suretyship. La. C.C. art. 1913.

[5] "The surety may assert against the creditor any defense to the principal obligation that the principal obligor could assert except lack of capacity or discharge in bankruptcy of the principal obligor." La. C.C. art. 3046. Like the lack of capacity or discharge in bankruptcy of the principal obligor, which are defenses that are personal to the principal debtor, so too is the defense afforded to the principal obligor by the Act. Based on the non-extinction of the principal obligation and because the defense recognized in the Act is personal to the principal debtor, such defense cannot be asserted by a surety. See La. C.C. art. 1801 ("A solidary obligor may raise against the obligee defenses that arise from the nature of the obligation, or that are personal to him, or that are common to all the solidary obligors. He may not raise a defense that is personal to another solidary obligor."). Accordingly, I disagree with the majority's holding that the sureties "may assert the defense of the [Act] because it is a defense that may be asserted by [the debtor] and does not fall within one of the two specified exceptions of La. C.C. art. 3046." **Newtek Small Business Finance, LLC**, 22-0188 at slip op. p. 5.

> The modification or amendment of the principal obligation, or the impairment of real security held for it, by the creditor, in any material manner and without the consent of the surety, has the following effects.
>
> An ordinary suretyship is extinguished.
>
> A commercial suretyship is extinguished to the extent the surety is prejudiced by the action of the creditor, unless the principal obligation is one other than for the payment of money, and the surety should have contemplated that the creditor might take such action in the ordinary course of performance of the obligation. The creditor has the burden of proving that the surety has not been prejudiced or that the extent of the prejudice is less than the full amount of the surety's obligation.

Thus, where the creditor opts to have a judicial sale conducted without an appraisal, an ordinary suretyship is completely extinguished; however, the effect of such action on a commercial suretyship[6] differs. See Rubin & Seymour, *Deficiency Judgments: A Louisiana Overview*, 69 La.L.Rev. at 849. Pursuant to La. C.C. art. 3062, a commercial suretyship is extinguished only "to the extent the surety is prejudiced by the action of the creditor," despite the impairment of the surety's subrogation right against the debtor that occurs without the surety's prior consent. See La. C.C. art. 3062; Rubin & Seymour, *Deficiency Judgments: A Louisiana Overview*, 69 La.L.Rev. at 849. In determining the extent of a surety's prejudice, consideration must be given to "the value of the collateral at the time of ... a judicial foreclosure without appraisal"

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[6] A commercial suretyship is defined in La. C.C. art. 3042:

> A commercial suretyship is one in which:
>
> (1) The surety is engaged in a surety business;
>
> (2) The principal obligor or the surety is a business corporation, partnership, or other business entity;
>
> (3) The principal obligation arises out of a commercial transaction of the principal obligor; or
>
> (4) The suretyship arises out of a commercial transaction of the surety.

The principal obligation involved a debt of Baker Sales, Inc., a corporation and a "business entity," and the "principal obligation arises out of a commercial transaction of the principal obligor." See La. C.C. art. 3042(2) & (3).

and the amount of the security interest in the collateral, as a commercial suretyship is extinguished only for the lesser of these amounts. See Rubin & Seymour, *Deficiency Judgments: A Louisiana Overview*, 69 La.L.Rev. at 848. Therefore, the amount of principal obligation (here, $3,044,569.46) recoverable by the creditor from the commercial sureties must be reduced by the value of the collateral or the amount of the security interest in the collateral, whichever is less.

According to Article 3062, "[t]he creditor has the burden of proving that the surety has not been prejudiced or that the extent of the prejudice is less than the full amount of the surety's obligation." Here, to be entitled to a deficiency judgment against the sureties, the creditor (Newtek) must prove that the sureties (the Bakers) were not prejudiced by the judicial sale without an appraisal by showing that the value of the collateral at the time of sale was $81,130, the sales price. Alternatively, Newtek must prove the amount by which the principal obligation exceeds the sureties' prejudice.

In summary, there is no statutory or codal basis for allowing a surety to benefit from the protections afforded to debtors, personally, by the Act. If a creditor forecloses in violation of the Act, the extent to which a suretyship is extinguished is governed by La. C.C. art. 3062. Accordingly, in determining the amount of the commercial sureties' obligation to the creditor, the amount of the debt owed to the creditor must be reduced by the lesser of the value of the collateral at the time of the judicial sale and the amount of the security interest.

For these reasons, I respectfully dissent from the majority's finding that "the Louisiana Deficiency Judgement Act (LDJA) applies to discharge the Bakers' obligation as sureties." **Newtek Small Business Finance, LLC**, 22-0188 at slip op. p. 6.

I would reverse the trial court's judgment and remand for an evidentiary hearing to determine the extent to which the Bakers were prejudiced by Newtek's failure to obtain an appraisal. At such hearing, the burden would be on Newtek to show the value of the property at the time of the judicial sale without appraisal and the amount of the security interest. The Bakers would be allowed to offer countervailing valuation evidence.

This statutory and codal analysis results in a balanced resolution, which both provides protection to the creditor, who relied on the promise of the sureties to pay if the principal obligor does not and prevents the creditor from receiving a windfall from the sureties when the creditor decides to sell the underlying collateral without an appraisal, while reconciling the law of suretyship and the Deficiency Judgment Act.